NO. 49596-1-II

COURT OF APPEALS, DIVISION (DIVISION NO. 2)

JIMMY WOODBEE PIERCE,
APPELLANT

v.

STATE OF WASHINGTON,
RESPONDENT.

Appeal from the Superior Court of Pierce County
The Honorable Kathryn J. Nelson, Dept. 13
Pierce County Cause No. 15-1-00480-0

AMENDED OPENING BRIEF OF APPELLANT

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3. The trial court erred when it held that JF was competent to testify.
4. The trial court erred when it entered findings 1, 2, 3, 4, 5, regarding the *Allen* factors in support of its finding that PP was competent to testify.
5. The trial court abused its discretion when it admitted child hearsay regarding statements made by PP.
6. The trial court erred when it entered the following findings on the *Ryan* factors related to PP's hearsay statements: 1, 3, 4, 5, 6, and ordered that hearsay statements to Angela Prendiville, Patrick Prendiville, Debbie Profitt, and Keri Arnold were admissible.
7. The trial court abused its discretion when it admitted child hearsay regarding statements made by JF.
8. The trial court erred when it entered the following findings on the *Ryan* factors related to JF's hearsay statements: 1, 3, 4, 5, 6, 7 and ordered that hearsay statements to Debbie Profitt, Jamie Robertson, Keri Arnold, and Michelle Breland were admissible.

9. The trial court had an independent duty to guarantee defendant's constitutional right to jury trial and should have inquired immediately each time that Juror No. 8 was observed to be sleeping during proceedings.

10. The trial court failed to comply with *RCW 2.36.110* and *CrR 6.5,* requiring unfit jurors to be excused, where the trial court, having been repeatedly advised that Juror No. 8 appeared to be sleeping, did not inquire until the alternates had been excused, thereby preventing the dismissal of Juror No. 8. Trial counsel was constitutionally ineffective for failing to follow-up on the court's report that Juror Number 1 believed Juror Number 8 had been sleeping during testimony, especially where there was some corroboration of this observation by court staff and the prosecutor's child interviewer.

11. The State failed to prove beyond a reasonable doubt that the defendant committed the crimes of first degree child molestation against PP and first degree child molestation against JF.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Witnesses are not competent to testify when, *inter alia*, they are too young to understand the obligation to tell the truth on the witness stand, have the mental capacity at the time of the occurrence to concerning which he is to testify to receive an accurate impression of it, a memory sufficient to retain an independent recollection of the occurrence, and the capacity to express in words

his memory of the occurrence. The trial court erred in finding an 11- year- old child competent when she did not know whether the alleged touching had been a dream or a real event, was unable to pinpoint a time the alleged touching, if in fact it had really occurred, made wildly inconsistent statements about whether the actually occurred, and failed to accurately recall objectively verifiable facts from the relevant time period – *i.e.*, names of teachers. The trial court erred in finding a 9-year-old child competent where the child acknowledged that although it was better to tell the truth than lie, still maintained that she would probably guess at an answer if she did not know because there was always a possibility she would say the right answer; where the child had no independent recollection of any touching and disclosed touching only in the presence of an aunt who questioned her against her mother's wishes and who received a disclosure identical to that which JF had heard PP make a few days before; where JF made inconsistent disclosures and had sufficient memory problems that her mother needed to "refresh" JF's memory before her court appearance so that JF would not forget the what she was supposed to testify about.

2. Out-of-court statements by children relating to abuse are not admissible unless the circumstances show the statements are reliable by substantially meeting the factors listed in *State v. Ryan*. The trial court erred in admitting the hearsay statements of PP where she had an apparent motive to lie, her statements were not spontaneous, the State failed to satisfy by Ryanfactors

1, 7, 5 and8. The trial court erred in admitting the hearsay statements of JF were she had an apparent motive to lie, her statements were not spontaneous; her initial disclosure was heard only by Debbie Profitt, who had been told not to question her; where Jamie Robinson had to remind JF what she had said in order to prepare JF for her trial testimony.

3. The trial court denied defendant his right to trial by jury as guaranteed by the *United States Constitution amend. VI* and *Wash. Const. art. I, § 22.* When the trial court was informed on numerous occasions by its own staff and jurors that Juror No. 8 was sleeping during the proceedings, the trial court had a duty to act to determine whether Juror No. 8's sleeping affected her ability to sit as a juror. The trial court's failure to do so deprived defendant of his constitutional right to trial by jury,

A criminal defendant's right to trial by jury is guaranteed by the United State Constitution amend. VI and Wash. Const. art. I, § 22.

4. The trial court failed to comply with *RCW 2.36.110* and *CrR 6.5* when it permitted Juror No. 8, the sleeping juror, to remain without inquiry and made inquiry only after the alternates had been excused, when the trial court had no option to release Juror No. 8. *RCW 2.36.110* requires the trial court to excuse from further jury service any juror, who in the opinion of the judge has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention, or any physical or mental defect or by reason of conduct or practices

incompatible with proper and efficient jury service. Further, *CrR 6.5* states that: "[i]f at any time before submission of the case to the jury a juror is found unable to perform the duties the court ***shall*** order the juror discharged."

5. The State failed to prove the charges beyond a reasonable doubt, thereby denying defendant the constitutional protections of *U.S. Const. amend. XIV; Wash. Const. art. I, § 3.*

C. STATEMENT OF THE CASE

1. Procedural Facts.

On February 5, 2015, the State of Washington charged JIMMY WOODBEE PIERCE, appellant, with four counts of first degree child molestation. CP 1-3. The State filed an amended information on April 12, 2016. CP 85-87.

The State filed a second amended information on August 3, 2016 and Pierce entered not guilty pleas to it on the first day of trial, August 8, 2016. CP 88-90, RP 4-5.

The court held a competency hearing to determine whether alleged victim PP could testify. RP 7 et seq. PP was eleven years old and in the sixth grade. RP 8. PP testified to recollection of her teachers' names from first grade through fifth grade. RP 9. She testified that her fifth grade teacher was Ms. Stafki, her fourth grade teacher was Ms. Barnes, her third grade and second

teacher was Ms. Murray, her first grade teacher was Ms. Severson, and her kindergarten teacher was Ms. Candy. RP 9-10.

PP identified defendant as someone who had been at the daycare she went to with her younger brother Tommy. RP 17-19. They attended that daycare until she was nine or ten years old. RP 23.

PP said she had never told a lie in her entire life. RP 25.

Defense counsel asked no questions of PP at the competency hearing. RP 27.

AP, mother of PP, testified at the competency hearing. RP 28 et seq. She testified that PP's kindergarten teacher was Ms. Kay, her first grade teacher was Ms. Brown, who also taught her in second and third grade, and in fifth grade she had Ms. Barnes. RP 31. AP thought PP possibly could have had Ms. Barnes in fourth grade and Ms. Stafki in fifth grade. RP 32.

AP's recollection of PP's teachers' names invalidated PP's testimony regarding the names of her teachers from kindergarten through third grade. *Passim.*

PP and Tommy attended the Pierce daycare, Little Bear, from the time PP was in first grade until she was going into fourth grade. RP 32.

PP had never been punished for lying. RP 46.

The trial court found that PP was competent to testify and that the State had satisfied the *Allen* factors. RP 293. The court found that PP had an understanding of the obligation to tell the truth, the mental capacity at the time

of occurrence to retain receive an accurate impression of it, a memory sufficient to retain an independent recollection of the occurrence, the capacity to express, in words, her memory of the occurrence, and the capacity to understand simple questions about it. RP 293.

Alleged victim JF testified at a competency hearing. RP 296. She had the prosecutor's dog Kylie sit with her while she testified. RP 297-298. On August 9, 2016, JF was 9 years old. RP 297. Her birthdate was 8/31/2006. RP 297. She was going into the fifth grade. RP 298.

She testified that her fourth grade teacher was Melissa Ottmar, her third grade teacher was Krista Cepner. RP 299. JF could not remember where she went to school in kindergarten, first, or second grade or who her teachers were. RP 298-300.

JF remembered that she had a friend named "Gracie" at the old school in Port Orchard but she could not remember whether "Gracie" was in her class or not. RP 301. JF remembered that she sometimes went to "Gracie's" house after school and that she met her mother but she could not remember if she met her father. RP 301.

JF remembered that when she was in kindergarten she went to daycare at her aunt Liz's house. RP 301. Her mom's name is JR. RP 302.

JF testified that she lived in Bremerton with her mom and her five year old sister. RP 302. They had lived in an apartment there for two years. RP 303-

304. She did not remember where they had lived before that, but she was "pretty sure" they had lived in an apartment in Port Orchard. RP 304. JF was "pretty sure" they lived there when she was in first and second grade. RP 305. She was "pretty sure" they lived somewhere else when she was in kindergarten. RP 305. JF knew she now lived in Washington but was "pretty sure" she had lived in Montana before. RP 305.

She knew the defendant because he is her uncle. RP 308. Her aunt Liz watched them at the day care. RP 311. She went there when she was in first and second grade. RP 312. She could not remember what she dressed up for Halloween during those school years although she did dress up. RP 314-315. She testified that she had various pets during her life but she could not remember how old she was or where she lived when she had them RP 315-316,

JF testified that regarding the difference between a truth and a lie. RP 317. She said it is better to tell the truth, no matter how badly you get in trouble. RP 317. She learned that from her mom "and a movie." RP 318. Her mom has the rule that she should not lie. RP 318.

JF lied once when she had an accident and then blamed it on a dog but she could not remember how old she was when this occurred. RP 318. She never admitted that she had lied or told the truth about that time. RP 318.

JF testified that she knew that she had to tell the truth in court and that she was being asked to come to court "because I got my private part touched." RP 319.

JF testified that if she did not know the answer to a question, it would be better to guess because ". . . sometimes it you guess, you could get it right." RP 320. After instruction and correction from the deputy prosecutor, JF still maintained that it would be "a little bit better to try guessing because sometimes if you don't know the answer and you just guess the answer, sometimes it could be the correct answer." RP 320.

After yet another try, the deputy prosecutor told JF that "it's important that you don't guess about anything you aren't sure about" and told her to "look at the judge and tell her [sic] that you promise not to make any guesses." RP 320-321.

On cross-examination, JF testified that she had guessed about where the touching happened because she was not sure. RP 322-323.

The prosecutor offered and JF agreed to "refresh" her memory by watching the interview with the prosecutor's interviewer before she testified at trial. RP 324-325.

JR, JF's mother, also testified at the competency hearing. RP 325 et. seq. JR did not recall the names of JF's teachers at her first two schools, either. RP 332-333. She did not recall the names of any particular friends that JF had at her

first school. RP 335. JR could not recall what JF had dressed up for any particular Halloweens. RP 344.

Since moving from the Gig Harbor area, the family had lived in four residences. RP 344-345.

JR had had some problems with JF telling the truth. RP 345. JF had lied about accidents and denied that she had caused them. RP 346. For example, she would wet or soil her pants when she was six and then stuff them in a corner and lie about being responsible for both the "accident" and the act of putting the pants in the corner. RP 346. JR punished JF by making her stand in the corner or go to her room. RP 346.

JR stated her punishments for lying had changed now that JF was nine. RP 346. She would take away her tablet, ground her, send her to her room, or take away fun stuff that had been planned for the future. RP 347.

In response to the deputy prosecutor's leading question, "But overall you describe her as a straightforward, truthful child?," JR answered affirmatively. RP 347.

After argument from the State, the court surprisingly found JF competent to testify. RP 425. The trial court was "impressed" that she had a "clear understanding" of the obligation to speak the truth on the witness stand, the mental capacity at the time of the occurrence to receive an accurate impression,

a memory sufficient to retain an independent recollection of the occurrence, the capacity to understand simple questions about it. RP 425.

The trial court heard testimony to determine the admissibility of hearsay pursuant to RCW 9A.44.120.

PP disclosed August 2014 while on a camping trip. RP 49, 51. PP was nine at that time. RP 60. During a conversation about "Jimmy being in the hospital" between her mother, PP's mother and her aunt, DP, PP mentioned that Jimmy had carried her upstairs on his shoulders. RP 28, 30-31, 51, 52, 53. PP then trotted off. RP 56. Angela was "freaking" and wondering why PP would have said that. RP 56.

Angela then found PP at some picnic tables and asked her, "did he touch you?" RP 58. Angela did not recall if PP shook her head or said no or what. *Id.* PP put her head down and Angela told her that she would not be in trouble. *Id.* PP then said, "yes." *Id.*

Angela "freaked out", focused on her husband, also PP who will be referred to PP's father, ran to him, and told him, "he touched her, he touched her." *Id.*

After the family returned home, AP and her husband agreed that the matter needed to be reported to Child Protective Services [CPS]. RP 73-74. AP told PP that she would need to talk to "the lady" and tell her what had happened. RP 74. PP cried and then told AP that when they got upstairs, "he" flipped her off

his shoulder "and did the spider up her leg and touched her pee-pee." RP 74. PP also said that he told her not to tell Liz. RP 75.

AP also called law enforcement and was instructed not to question PP. RP 78. When the police officer responded, AP did not tell her that PP had initially denied that "Jimmy" had touched her. RP 80.

At one when AP was question PP, PP stated that she "didn't know" if anything had happened. RP 80-81. According to AP, the CPS lady told her to tell PP that it was "not her fault" in an effort to persuade to her affirm that she had been touched. RP 81-82. PP also stated that two other children at daycare "Brooke and Hanley" went upstairs at daycare RP 83.

AP took PP to see a therapist about the alleged touching. RP 85-86. PP would not talk to the therapist. RP 87. PP later went to a "forensic interview" where she reportedly made some disclosure. RP 89-90.

PP's father testified that his daughter PP disclosed the touching after she stopped going to the Pierces' daycare. RP 205. PP stated that she went upstairs with Jimmy and that he flipped her onto the couch and "did a spider like spider fingers on her leg." RP 216. She stated that he touched her on her "pee-pee." RP 216-217. To her father, her use of the term "pee-pee meant her vagina. RP 217. She gestured to this area. RP 217. This touching occurred over her clothing. RP 218.

DP and JR, and JF are related to the defendant. RP 245. Defendant is DP's brother-in-law. RP 245. Liz is her sister. RP 245. On the camping trip, PP was present during the conversation when AP and DP were talking about defendant being in the hospital. RP 260. PP spontaneously stated that "Jimmy took me upstairs and gave me candy." RP 260. When AP said, "What?", PP repeated that statement. RP 263. When AP persisted in trying to determine where upstairs PP had been taken, PP yelled, "I knew you were going to make a big deal out of this." RP 263. AP responded, "This kind of is a big deal, PP." RP 263. PP then withdrew. RP 263. AP asked PP at least four times if "he" had touched her and PP said nothing. RP 264-265.

DP then looked at PP and said, "did he touch you anywhere your bathing suit would cover"? RP 265. PP would not talk. RP 265. PP then got up and went inside the camping trailer. RP 265.

DP told AP to calm down. RP 266. DP thought something did not seem right but she also thought AP needed to calm down. RP 267. AP later approached DP and informed her that PP had given more information, stating that she had been touched. RP 268.

PP's father also talked to his daughter in the trailer. RP 277-278. He came out and told DP and the adults present that his daughter said "Jimmy had carried her upstairs on his shoulders, did a flipping thing on the couch with her, and then used his hand on her vagina real fast." RP 278.

Everyone there thought it had been an accident, nothing intentional. RP 278.

Several days later when Profitt questioned JF about touching against her mother's orders, Profitt claimed that JF that Pierce had "tickled her up her leg, like a spider, and touched her vagina." RP 280-281, 282. DP texted JR, PP's father, and AP regarding Jayden's allegations. RP 286. Police and CPS later contacted DP. RP 288.

After DP told JR that the defendant had touched her, JR called her mother and CPS. RP 365, 366. On their way to the "forensic" interview, JF and her younger sister IF were tickling each other. RP 370. JR asked JF if she had ever been tickled in a way she did not like and JF replied that her Uncle Jim had and he made her pee her pants. RP 371. JF said that he made her spread her legs and touched her front private and tickled her. RP 371-372. She called her front private her "bad spot" because JR had told them nobody was allowed to touch them there. RP 372.

JR did not discuss this subject again with JF until shortly before it was time to go to court. RP 374. At that time, JR wanted to make sure JF would remember for court. RP 374. JR emphasized that she wanted JF to be prepared for court. RP 378.

At that time, JR asked JF what had happened with Jimmy. RP 378. JF said he had touched her. RP 378. "It took her awhile" to say where he touched her. RP

378. JF just blankly stared at JR when asked to tell where she had been touched. RP 378. JR contended that when she reminded JF that she was not in trouble, JF said vagina. RP 378.

During a medical examination at Mary Bridge on August 28, 2004, JF told nurse Michelle Breland, "all I remember is my uncle tickling me in my private." RP 449. When asked her uncle's name, she said "Jim." RP 437, 449. She did not remember anything else. RP 450. When Breland asked her if this happened when she was still 7 years old, she said yes. RP 450. When Brelad asked her if this happened in the summertime, she said yes. RP 450.

The court held that JF's statements to Breland were admissible as statements made for medical diagnosis and treatment because JF showed her understanding that Breland could provide treatment such diagnosis and treatment. RP 465. JF did so be talking about her concerns about her eye. RP 465.

Jimmy had intervened on one occasion when JR was putting vinegar in JF's mouth because she was lying. RP 381. JF was coughing up the vinegar and Jimmy told JR that this was poor parenting. RP 381. JR did not like Pierce's critique of her discipline of her children. RP 383. At one point, Jimmy called her an unfit mother. RP 385. JR said that this "pissed her off." RP 385. Both JR and AP discussed prior to the disclosures that the Pierces were mean to the kids. RP 385.

The State acknowledged in closing the PP had wavered in her testimony. RP 1634. PP initially said there had been no touching. RP 1634. The State attributed this to her mother's obvious emotion and PP's desire to protect her. RP 1634-1635. However, the State acknowledged that for the next several days AP barraged PP with questions regarding whether she had been touched and that PP made a statement that she had been touched. RP 1635. The State argued that AP's questions were trying to suggest to PP that nothing had happened. RP 1635.

The State admitted that PP told its interviewer that she was not certain that the defendant had touched private. RP 1625. She later said otherwise. RP 1626. She also told the interviewer that at one point she thought it was a dream but that she felt otherwise at the interview. ROP 1637.

The State argued that JF had always been consistent regarding the incident in the motor home. RP 1639. The State further argued that JF's statements to its interviewer that additional touching occurred in the living room and his bedroom was sufficient for conviction on the other two counts. RP 1639.

Juror No. 1 spontaneously interrupted the State's closing argument to report that there was a juror falling asleep. RP 1661. The court asked if there was a need for a break. RP 1661. Juror No. 8 replied that he/she was listening.

RP 1661. Defense counsel failed to ask the court any relief at that time. Passim, RP 1661, 1666.

In his closing, defendant emphasized that JF was present at the camping trip when AP and DP questioned PP about being touched by defendant. RP 1669. The girls were together at the picnic table area when AP began questioning PP just a few feet. RP 1670.When AP started screaming that the defendant had touched PP, she did so in front of PP, too. RP 1670-1671. DP stated that afterwards, AP and Pat [her husband] "were openly discussing it in front of everyone, to include these kids." RP 1671. According to PP, JF was sitting right there. RP 1671. JR did not want to ask if JF had been touched. RP 1671. However, defense counsel argued that it was not credible that no one asked if JF had been touched when the touching was the consuming topic of the camping trip and the girls were present during much of the conversation. RP 1672. The only reasonable inference is that JF denied that she had been touched.

When JF first said something had happened, she used the same words PP had used. RP 1672.

DP later questioned JF the next day, out of the presence of every other adult. RP 1672. However, JR stated that JF was not questioned until three or four days later after PP had recanted. RP 1672.

JF also lacked credible details in her testimony. JF had stated that the touching happened more than once in the living room but then denied that it

ever happened in the living room. RP 1673. She also said it happened in the bedroom or the living room. RP 1673. JF said the defendant bribed her with candy but she could not remember a single time he had done so. RP 1673.

Likewise, PP had serious credibility issues. PP testified that she talked to her dad about the touching the day after the camping trip. RP 1674-1675. But her dad said there was no discussion. RP 1675. AP testified that PP denied being touched, despite Ap's repeated and insistent questioning. RP 1673-1674. PP told her mother "N-O" when she continued questioning in DP's presence. RP 1677. The questioning during which PP insisted that she had not been touched last 20-30 minutes. RP 1677. Finally, during this maternal interrogation, PP said she wasn't sure, that she didn't remember, and that maybe she had dreamed it. RP 1678. Although AP knew that PP made up stories, she ran with this one. RP 1678.

In rebuttal, the State conceded that AP questioning of PP was improper and "the only suggestibility in this case." RP 1684. The State attributed this to her maternal concern and, interestingly, spun the argument to make the incessant questioning "the only basis PP questioned herself." RP 1684.

Following closing arguments, the court excused jurors 13, 14, and 15. RP 1686.

Only after the alternates had been excused did the State ask to have Juror No. 8 questioned about her sleeping problem. RP 1703-1704. Defense

counsel asked to dismiss her for cause and objected to counsel questioning a deliberating a juror. RP 1704.

The State's recollection was the juror had been reported to be sleeping during the forensic interviewer's testimony, the playing of one of the children's interviews, and also during the State's closing argument. RP 1795.
Defense counsel wanted the court to ask her "whether given her apparent sleeping, she has not heard any of the evidence or missed any of the testimony." RP 1705.

During the court's subsequent questioning, Juror No. 8 stated, "It wasn't a full sleep. It was a brief closing of my eyes, slightly longer than blinking, yes." RP 1706. The juror explained, "Not full sleeping. I'm still listening." RP 1707. The juror also offered, "Sometimes when my eyes are open, I'm looking at everybody else and seeing what they're doing, and it distracts me from, like, whatever they're actually saying." RP 1707. The juror explained that closing her eyes could keep her thoughts from wandering. RP 1707.

The court then asked Juror No. 8: "Well, because of that or because of actually dozing off, do you believe that you have fully and fairly heard all the evidence in the case in a way that enables you to perform your duties as a juror?" RP 1707. The juror answered, "Yes, I do."

Defense counsel submitted "there is now a credibility issue in addition to the fact of sleeping, given the court's observations of the juror" and asked the court to grant its motion to excuse the juror. RP 1708.

The court denied the motion. RP 1708.

The jury subsequently convicted the defendant on Count I, Count II, with the statutory aggravator of abuse of trust. The jury acquitted the defendant on counts III, and IV. RP 1718-1720; CP 106-114.

On October 14, 2016, the parties appeared for sentencing. RP 1727. The court imposed 66.75 month to life, the high end of the standard range on Count I, attempted first degree child molestation, and midrange of 78 months without any exceptional sentence on Count 2, child molestation in the first degree. RP 1743; CP 161-176, 177-178.

The defendant thereafter timely filed this appeal. CP 181.

Trial Testimony.

Jimmy Woodbee Pierce was born on September 20, 1963. RP 1329. He worked at Boeing in Seattle. RP 1390. He typically left the residence at 4 a.m. because his shift started at 5 or 5:30 a.m. RP 1462. He typically arrived home between 3 and 3:30 p.m. RP 1462. He was in a vanpool. RP 1462.

His wife, Liz Pierce ran a home daycare business. RP 1343, 1390. Their children Jimmy and Dylan lived there as well. RP 1345.

The daycare primarily was run in the lower level of the residence and the children typically spent their indoor time there. RP 1354-1355. The middle level of residence contained the kitchen and the bathroom that the children used. RP 1355-1356. Some of the daycare kids also slept on the third floor bedrooms at nap time. RP 749. The daycare included a fenced backyard that contained many toys for children. RP 1356.

The daycare rules permitted the children to go upstairs to the kitchen and also to have treats or candy. RP 1361.

The defendant sometimes was home when the children were at the daycare. RP 1357. He played outside with them, maybe throwing balls with them or playing with the other toys with them. RP 1357-1358. He also played fetch with the family dog. RP 1364. Sometimes he helped children with their homework. RP 1364.

The school-age children were not home when defendant returned from work as they did not return from school until 4 p.m. RP 1472.

Defendant and the children liked to exchange "knuckles." RP 1473.

PP, date of birth 11/11/04, was starting the sixth grade in August 2016. RP 608, 612. She remembered that when she was younger and in kindergarten she went to Little Bear Daycare. RP 615, 616. She recognized the defendant from there. RP 616. He was the "daycare lady's husband" and she liked him. RP 617.

When she was in second grade and at the daycare, PP claimed that defendant took her up to the third floor by carrying her so that she was leaning over his shoulder, flipped her onto the couch and touched her private spot with his fingers. RP 629, 633. She defined her private spot as where she goes to the bathroom. RP 630. Defense counsel then stipulated that it was "her front, her vagina." RP 630-31. He said he would give her candy upstairs. RP 631. He told her not to tell Liz. RP 632. This was over her clothing. RP 636.

PP said this only ever happened once. RP 635. For a long time afterwards, she thought she had dreamed this. RP 635. On the day she testified, she believed that he did it "for real." RP 635.

She eventually told her mom on a camping trip when she about to start third grade. RP 638-639. She told her because "it was kind, of like, bugging me." RP 638. When she told her mom, her mom was scared and mad and went to get her dad. RP 640.

PP testified that the defendant was usually not at the daycare in the morning when she was dropped off but that if he "sometimes" was, he went to work right after. RP 656. He was there after work. RP 656.

When the defendant was there after work, he asked PP about how much time her dad stayed when he dropped her off and whether or not he was interacting with his wife Liz. RP 656. This went on for about a year and a half. RP

656. When defendant asked her questions about her dad and Liz, her parents did not like it. RP 659, 661.

On cross-examination, PP acknowledged that when she was first questioned by her mother in the present of DP [Debbie}, her mother asked her if defendant had done anything else to her than take her upstairs to give her candy. RP 663. She answered her mother's question by shaking her head "no". RP 663. When her mother asked her directly if anything else happened with the defendant, PP said "no". RP 664-665.

When asked about her inconsistent statements on cross-examination, PP said, "I want my mom." RP 668.

After the recess, PP acknowledged that she first told the prosecutor's "forensic" interviewer that she "didn't know" if the defendant had touched her. RP 671. When they discussed the touching the second time, PP again told the interviewer that she "didn't know" if he touched her private part or not. RP 671. When they discussed the touching a third time and PP demonstrated the touching, she again stated that she "did not know" if he had touched her private part or not. RP 671.

PP denied ever telling her mother that defendant did the spider with fingers up his leg before her touched her private. RP 672. She could not remember telling her father or the "forensic" interviewer that he had done so. RP 672.

AP's children went to the Pierce's daycare for almost four years. RP 689-690. AP had been concerned about Jimmy's questioning of PP about who dropped her off, how long they stayed, etc. RP 696.

When they were camping and PP told AP that Jimmy had carried her upstairs on his shoulders, she had looked at PP "in shock." RP 700-701. PP stated that Jimmy had carried her "upstairs" which could have been to the kitchen on the second floor or to the bedrooms on the third floor. RP 749. PP was not specific. 749.

The daycare children did use the kitchen. RP 749, 750. AP was shocked because PP's statement that Jimmy had carried PP on his shoulders was was unexpected, shocking, and alarming. RP 701, 750. She wondered why he had taken her out of the daycare area, and "yes, that was on my mind, did he touch her, yes." RP 750, 751.

AP was cannot recall any conversation between DP and PP about any touching at that time. RP 752. This is so because, although there had been no discussion or disclosure of touching, AP was "in shock." RP 753.

At one point, AP was concerned that her repeated questioning of PP might have influenced PP's answers. RP 759. PP initially said there had been no touching but after AP asked so many questions, PP changed her answer to yes. RP 759.

She questioned her for two of the three days the family was on that camping trip. RP 768. AP explained at trial, "I questioned [PP] so much for those three or four days, I don't recall actually what all she said, but at one point, she did say, "I don't know." RP 770.

Later on, AP asked PP if Jimmy had touched her and PP said "no." RP 705, 741. After AP encouraged her more than once to tell her if he had touched her, PP said he had touched her "pee-pee." RP 706. After this disclosure, AP was "frantic" and "kind of, I guess, crazy" and went straight to her husband. RP 707, 708.

When she was talking to her husband, Jayden, Jamie's daughter, could have been there. RP 762. Jayden and PP were interacting the rest of that day. RP 763.

AP later called CPS. RP 713. She was instructed to call the police. RP 719. When a CPS caseworker went to AP's residence, she told AP to quit questioning PP. RP 725. However, AP continued to question PP. RP 731. She called CPS "a lot." RP 732. During one conversation, PP said she did not know if anything had happened. RP 733. When AP reported that call to CPS, she said, "She doesn't know. Maybe she changed her story." RP 734. During one phone call with CPS, AP reported that PP initially denied that any touching had occurred. RP 730, 731.

PP later attended the forensic interview. RP 735. After the interview, AP was informed that PP's disclosure was consistent with her prior statements regarding being touched by Jimmy. RP 740. At the forensic interview, AP told the interviewer that PP was not certain whether the defendant had touched her private part. RP 771.

AP also acknowledged that PP sometimes made up stories. RP 774. However, in her testimony the next day, she did not recall saying that. RP 784. After reviewing the transcript of her testimony from the day before, she acknowledged her prior testimony. RP 785. She also agreed that she had informed Jan Larimore, the defense investigator, that PP had made up stories in the past and AP did not limit the subject matter of those stories. RP 785.

PP's father had previously stated that his relationship with the Pierces was irreparably damaged when his family left their daycare. RP 864-865. He later vacillated on this point. RP 882-883.

PP's father was not aware that PP had told AP that she wasn't sure if defendant touched her private part. RP 877.

PP's father was not aware that PP initially told the prosecutor's interviewer that she did not know if defendant had touched her private part or not. RP 877.

PP's father did not know that PP said that if she told people she was not sure, it's because she may have dreamed it. RP 877-878.

DP, Liz Pierce's sister, had no contact with Liz or defendant after her niece JF disclosed abuse. RP 891. DP's niece is named Jamie R and her daughters are JR and IR. RP 895. At one time, Jamie R's children attended Liz's daycare. RP 898.

On the August camping trip, DP and AA were sitting around discussed defendant went PP said that he had taken her upstairs and given her candy. RP 902. DP assumed that this was part of the daycare where the children were not allowed to play, although PP had not specified whether she had been in the kitchen or the upper floor where the bedrooms are. RP 902. Although AP tried to clarify this point, PP did not answer. RP 903, 942-943. AP talked to PP for a long time and asked her where about her body did defendant touch her, did he touch her anywhere, did he touch her anywhere her bathing suit would cover. RP 905-906, 945, 947, 948, 949. DP believed that AP's questions were hindering the situation. RP 905.

Later on, Jamie R saw AP running toward her husband yelling, "He touched her. He touched her." RP 913. AP yelled this several times. RP 915. She told DP and that AP's husband defendant had touched PP. RP 915-916.
DP believed that any touching that might have occurred would have been accidental. RP 918.

DP asked the mother, JR, of JF and IF, about PP's disclosure. RP 921. She stated that she did not want to ask JF about it. RP 921, 1084. JR did not want DP to talk to her daughters. RP 1089. DP told her that she "had to." RP 922.

DP took it upon herself to ask the girls the next day. RP 922. JF stated "he tickles me", right to what [PP] had said about the tickling and I knew, I just –I knew." RP 924. JDP later gave this information to JF's mother, AP, and PP[father] RP 926.

DP had never seen defendant sexually touch a child. RP 965-966, 973. JF later told her mother that the defendant had touched her "front pee-pee." RP 1096, 1097.

JF testified that she started daycare at the Pierce's residence when she was in kindergarten or preschool. RP 996. She stopped going there in second grade. RP 1000. JF could not remember whether the daycare children were allowed to go into the upstairs living room and bedrooms. RP 998.
JF testified that sometimes the defendant would give her candy when he "would try bribing me to touch my private part [the place she goes pee or her vagina]." RP 1007, 1008. This happened once or twice or three times. RP 1008, 1013. JF said that one time this happened in a camper in the backyard. RP 1009. She did not remember the time of year. RP 1010. She did not tell anyone. RP 1010.

JF testified that she did not remember the time the defendant gave her candy and tried to touch her private parts. RP 1011. JF did not remember

anything happening upstairs in the living room. RP 1012. JF did not remember ever being in the bedroom with the defendant. RP 1013.

JF could not remember ever telling her mother about this. RP 1016. JF could not remember talking to the prosecutor about these allegations. RP 1017.

JF did not remember ever telling her aunt DP that defendant tickled and she was certain that she did not tell her that. RP 1018. She did not remember any interview with the prosecutor's forensic interviewer where she said that defendant tickled/touched her private parts. RP 1021.

JF did "not really" remember telling the nurse that defendant had tickled her private parts. RP 1022.

JF did not remember DP or her mother asking her questions about the defendant. RP 1040.

JF did not know what grade she was in when this happened. RP 1041, She did not know how old she was. RP 1041. She could not remember any time where the defendant used candy to bribe her to touch her private parts, even though she had testified this happened one or two times. RP 1041. JF could not remember defendant giving her any bad touches in his bedroom or living room. RP 1041. She thought she could remember one time in the camper. RP 1041-1042, 1044.

JF had testified that she "pretty sure" she told the prosecutor's interview the truth but she was not sure because it was so long ago. RP 1042.

JR later discussed the touching with JF in order "to prepare her for court." RP 1101. She asked where she had been touched and how many times. RP 1102-1103.

JR reviewed the charging documents in the case prior to her testimony. RP 1104. JR admitted that defendant did not like the way she physically disciplined her children when she lived with the Pierce family. RP 1105.

The prosecutor's child interviewer agreed that improper questioning of a child can shape a child's responses. RP 1216. Such questioning even can result in false allegations of child abuse. RP 1216, 1219, 1219-1220. A child's responses may reflect what the parents want to hear. RP 1217. Repeated questioning may influence what the child thinks the parent wants to hear. RP 1217. Repeated questioning may cause the child to incorporate information. RP 127-1218. Repeated questioning may provide details to the child. RP 1217-1218. Children's answer may be contaminated through the use of leading questions. RP 1219.

Repeated questioning can negatively influence the reliability of the child's statements. RP 1220. Reliability is important to avoid false prosecutions. RP 1220.

The child interviewer did not know that PP had told other people that she was not sure about the touching and that she may have dreamed it. RP 1223.

The child interviewer did not who DP is or that she had questioned JF. RP 1223. She did not know if leading questions were used. RP 1224. She did not know how many times JF was questioned by JR. 1224.

JF had a medical examination with Michelle Breland, a pediatric nurse practitioner at Mary Bridge Children's Hospital. RP 1261. JF told her that her Uncle Jim had tickled her privates when she was seven and she answered "yes" when Breland asked if this had happened in the summertime. RP 1231-1232.

Tara Stewart had her twin girls at Little Bear Daycare from the time they were fourth months old for several years. RP 1342-43. The daycare was run by Liz Pierce. RP 1344-45. Over this several year period, her daughters were there from 6:30 a.m. until 5:30 p.m. five days a week. RP 1343. She dropped off and picked up her children 90% of the time. RP 1343-1344. She knew the defendant because he lived there and she sometimes saw him playing with the children outside or helping them with their homework. RP 1357-1357, 1366.

The daycare children got along well with the defendant and did not appear scared of him. RP 1384.

His interaction with JF appeared normal and appropriate. RP 1366. She observed him helping PP with her homework, nothing out of the ordinary. RP 1366, 1367,

However, the daycare was run by Liz and she never saw Mr. Pierce alone with a child a daycare. RP 1364. She never walked in on him when he was alone

with a child, even in a room, or even in a separate location outside the vision of another person. RP 1364-1365. She never saw him attempt to have secrets with any kids or tickle any kids. RP 1365.

Mr. Pierce worked outside the home and was generally there a couple of times a week when she picked up her daughters late in the afternoon. RP 1363-1364.

Ms. Stewart also knew the other families. She knew that PP's families had taker out of the daycare a few months before they made these allegations. RP 1348. Prior to their leaving the daycare, DP and PP [father] socialized with the Pierces and were friendly. RP 1348-1350.

Ms. Stewart also knew JR, mother of JF, and had known her for about five years prior the allegations. RP 1352, 1533.She knew that JR was related to the Pierces and that they had a social relationship. RP 1354.

Mel Clark Wensel, Director of the Academic Services for the Integrated Social Sciences Program at the University of Washington in Seattle also testified. RP 1387-1388. His two children RW and MW attended the Little Bear Daycare, starting in 2007. RP 1389. MC and his wife chose this daycare because "the kids were always well taken care, of, so they liked it there." RP 1390. When MC picked up his children from daycare, he was either outside watching the kids play or else sitting on the stairs watching the kids while Liz in the kitchen starting dinner. RP 1401.

He talked to the kids but he had a strict policy of not engaging in active care, such as changing diapers. RP 1415. He also did not walk into a room where he was alone with a child, take a child into another room where they would be isolated, take a child into the motor home.RP 1416-1417. He never seemed to be trying to have secrets with any child, never tickled any child. RP 1417-1418.

MC observed his relationship with JF, a relative, and thought it was a normal family relationship. RP 1418.

Liz Pierce, the defendant's wife, also testified at trial. RP 1435-1436. She owned and ran the Little Bear Daycare after they were married. RP 1438. It opened in 2001. RP 1438. DP is her sister. RP 1439-1440. There was a period in 1998 when they had no contact for about a year. RP 1440. The, after a situation in 2012, DP cut off contact with Liz for for 2012-2013. RP 1441-1442. The relationship continued to be estranged when the allegations were made against the defendant in August 2014. RP 1442.

Prior to the time DP questioned PF, Liz's niece JR's daughter, Liz, JR, and JF maintained relationship, despite some issues that existed between JR and defendant. RP 1443. There was an issue one time in 2013, when JR and her daughters JF and IF briefly lived with the Pierces and the defendant became angry because JR put vinegar in JF's mouth, causing her to vomit. RP 1445. JR also sometimes took off for days without notice, leaving her children with the Pierces. RP 1446-1447. JR also became angry at a Memorial Day camping trip in

2014 when defendant told JF she could have a cookie, not knowing that JR had just told her that she could not have one. RP 1452-1453. The cookie argument escalated into a major confrontation. RP 1453.

Through it all, JR and IF attended Little Bear Daycare. RP 1448-1449. The Pierces were initially social with AP and PP's father when they started bringing their children, PP and TP, to the day care. RP 1454. PP[father] flirted with Liz and she was uncomfortable with it. RP 1455-1457. When he brought the kids to daycare, he hung around as long as the defendant was not present. RP 1457. If defendant was present when PP's father picked up his kids, PP's father was standoffish, picked up the kids, and just left. RP 1457.

There was no mistake in Liz's mind that PP was flirting with her. RP 1457. Defendant noticed it when the families were camping and PP's father followed Liz around and acted as though AP did not even exist. RP 1457. Defendant was upset about this. RP 1457-1458.

The daycare kids were allowed in the daycare area, kitchen, first bathroom and backyard. RP 1484. However they would go into the other areas of the home, including the living room and the bedroom once in a while and she would tell them to get out. RP 1485.

PP had been back in Dylan's room so she knew the back part of the house. RP 1486. Dylan was approximately PP's age. RP147-148. JF lived in the house and so was very familiar with the layout. RP 1486.

Liz never saw defendant take any child off alone with him. RP 1489. She never walked into a room and found him alone with a child. RP 1430. She never saw any indication that he wanted to have or had any kind of secret with a child. RP 1490. She never saw him tickle anyone. RP 1490. Neither JF or PP ever appeared scared of defendant and always had "normal" interactions with him. RP 1490. Liz never saw anything inappropriate with any of the children in her home. RP 1491. and always had "normal" interactions with him. RP 1490. Liz never saw anything inappropriate with any of the children in her home. RP 1491.

When Liz was sick, she closed the daycare. RP 1511.

The defendant testified at trial. RP 1542 et seq. He was on leave from Boeing where he had worked for 28 years as a manufacturing engineer and instead working at Goodwill. RP 1542-1543.

Defendant had not seen DP since Dylan's birthday party in 2012 or 2013. RP 1550. At that time, DP became angry and accused the birthday boy of pulling down a "big jumpy thing" by her pony tail. RP 1550. There was an argument and she left. RP 1551.

Defendant acknowledged that he had argued with JR about her leaving her children with the Pierce family days without notice to them, for her physical discipline of her children, for expecting Liz to wash her clothes and her children's' clothes, and for pouring vinegar down JF's throat as punishment for

lying. RP 1556-1557. This later event led to a continuing argument when defendant expressed his concerns about her parenting abilities. RP 1558-1559.

Defendant acknowledged that he believed that PP[father] had been trying to have an affair with Liz and that he did not care for this. RP 1562-1563. PP[father] followed Liz around on camping trips, tried to sit next to her whenever possible, offer her drink from his glass. RP 1564, 1565. He felt bad about this and talked to Liz. RP 1566-1567.

AP and PP stopped bringing their children to the daycare about two or three months before the allegations were made. RP 1568.

Defendant acknowledged that he discussed the alleged ticking with detectives in a voluntary statements in August 2014. RP 1609. When first asked about tickling he said, "No. No, not -no." RP 1610.

The detective followed up with a question:

Q: Well, tell me about a time that you tickled or joked around with them like that?

A: Only on – if I have – it's probably, like outside with them, you know, just kind of kidding them, not really tickling them, you know. Maybe tickling their stomach like this or something like that, but other than that, no. RP 1598.

C. LAW AND ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT FOUND PP AND JF COMPETENT TO TESTIFY.

Appellate courts give great deference to a trial court's determination of a child's competency or lack thereof--the trial judge's findings "will not be disturbed on appeal in the absence of proof of a manifest abuse of discretion." *State v. Swan, 114 Wn.2d 613, 645, 790 P.2d 610 (1990)* (quoting *Allen, 70 Wn.2d at 692*).

a. Admission of an incompetent person's testimony in a criminal proceeding violates the due process right to a fair trial.

Erroneous evidentiary rulings violate Due process by depriving the defendant of a fundamentally fair trial. *U.S. Const. amend. XIV; Estelle v. McGuire,* 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed 2d 385 (1991). Due process is violated where the admission of evidence is arbitrary or so prejudicial that it renders the trial fundamentally unfair. *Walters v. Mass.*, 45 F.3d 1333, 1357 (9th Cir. 1995).

No person may be convicted of a crime unless each element is proved by competent evidence beyond a reasonable doubt. RCW 9A.04.100(1). The trial court has a threshold obligation to ensure witnesses are competent to testify. *State v. Maule*, 112 Wn.App. 887. 891. 51 P.3d 811 (2002). A proposed witness is presumed competent to testify unless the defense establishes incompetency by a preponderance of the evidence. *State v. Brousseau*, 172 Wn.2d 331, 341-42, 259

P.3d 209 (2011). By statute, certain individuals are incompetent to testify: (1) those who are of unsound mind, or intoxicated at the time of their production for examination; and (2) those who appear to incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly. *RCW 5.64.050.*

For a child witness to be competent, the court must find the child (1) understands the obligation to speak the truth on the witness stand; (2) had the mental capacity at the time of the occurrence to receive an accurate impression of the matter; (3) has a memory sufficient to retain an independent recollection of the matter; (4) has the capacity to express in words her memory of the occurrence; and (5) has the capacity to understand simple questions about the occurrence. *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967). A child's age is not determinative. *Allen, supra*. Satisfaction of each element is critical to a determination of competency. *Jenkins v. Snohomish County Public Util. Dist. No. 1*, 105 Wn.2d 99, 102-03, 713 P.2d 70 (1986).

Although a trial court determines competency pretrial, this Court examines the entire record to review that determination. *State v. Avila*, 78 Wn.App. 731, 737, 899 P.2d (1995). The trial court's determination of competency is reviewed under the abuse of discretion standard. *Allen*, 70 Wn.2d at 692.

In this case, neither PP nor JF satisfied the *Allen* factors for competency. The trial court thus abused its discretion when it found they were competent to testify. Findings of fact are reviewed for substantial evidence.

Likewise, a child who has a "long-standing, often-observed inability to distinguish what was true from what was not" may also be found incompetent to testify. *State v. Karpenski, 94 Wn. App. 80, 106, 971 P.2d 553 (1999)*, overruled on other grounds by *State v. C.J., 148 Wn.2d 672, 63 P.3d 765 (2003)*. But inconsistencies in a child's testimony go to weight and credibility, not to competency. *State v. Carlson, 61 Wn. App. 865, 874, 812 P.2d 536 (1991)*.

(aa) *PP was not competent to testify.*

The trial court erred when it entered the Order Finding Child Victims Competent to Testify at Trial. The trial court erred when it entered FOF 2, that "PP had the mental capacity at the time of incident to receive an accurate impression of it." CP 96-98. State v. Przybylski held a child must be able to demonstrate, at least, the ability "to receive just impressions of and accurately relate events which occurred at least contemporaneously with the incidents at issue . . . ." *State v. Przybylski, 48 Wn. App. 661, 665, 739 P.2d 1203 (1987)* (emphasis added). If the child can relate contemporaneous events, the court can infer the child is competent to testify about the abuse incidents as well. Id.

If the trial court has no idea when the alleged event occurred, the trial court cannot begin to determine whether the child had the mental ability at the

time of the alleged event to receive an accurate impression of it. *Allen, 70 Wn.2d at 692*; *State v. Pham*, 75 Wn. App. 626, 630, 879 P.2d 321 (1994).

A child who is unable to determine when during two years an incident occurred may be found incompetent. *In re Dependency of A.E.P.*, 135 Wn.2d 208, 224-26, 956 P.2d 297 (1998). Thus, in *A.E.P.*, the court reversed the trial court's finding that the child was competent to testify. In that case, the court held that the sole fact that A.E.P. supplied particular details about the alleged touching when questioned by the court does not in itself guarantee A.E.P.'s ability to accurately recall the events. 135 Wn.2d at 225. Without any concrete reference, there is no way to guarantee the child's recall of details is based on fact, as opposed to fantasy. *Id.*, citing *Przybylski*, 48 Wn. App. at 665 (Witness' memory and perception are "better tested against objective facts known to the court, rather than disputed facts and events in the case itself."). the court should have determined whether the child has the capacity at the time of the event to receive an accurate impression of the event. *Id.* This would have required the trial court to fix a time period of the alleged abuse. Absent this critical information, and despite the high level of deference accorded to the trial court's competency findings, the court concluded, "We are compelled to hold the trial court abused its discretion in finding A.E.P. competent to testify." *A.E.P.*, 135 Wn.2d at 226.

Although a trial court determines competence pretrial, this court examines the record to review that determination. *State v. Avila*, 78 Wn.Ap.. 731, 737, 899 P.2d 11 (1995).

In this case, the trial court did not fix the time a time period of the alleged abuse. Further, to the extent that a general time period may have been established, PP failed to demonstrate the mental capacity at the time of the incident to receive an accurate impression of it.

PP could not accurately recall objective facts from the time during which the alleged abuse occurred. During the competency hearing, she testified to the recollection of the names of her teachers from kindergarten through fifth grade. RP 9. At the time of her testimony, she was eleven years old and in sixth grade. RP 8. PP testified that her fifth grade teacher was Ms. Stafki; her fourth grade teacher was Ms. Barnes; her third and second grade teacher was Ms. Murray; her first grade teacher and was Ms. Severson, and her kindergarten teacher was Ms. Candy. RP 9-10.

AP, PP's mother, testified that PP's kindergarten teacher was Ms. Kay, her first grade teacher was Ms. Brown who also taught her in second and third grade, and that in fifth grade she had Ms. Barnes. RP 31. AP thought it possible that PP teachers were Ms. Barnes in fourth grade and Ms. Stafki in fifth grade. RP 32.

AP's testimony established that PP's testimony regarding the names of her teachers from kindergarten through third grade was incorrect. *Passim.*

PP and her brother attended Little Bear Daycare from the time PP was in first grade until she was going into the fourth grade. RP 32. These were the years for which she had no accurate recollection of the names of her teachers.

In this case, PP was at the day care for more than three years. Her capacity to receive accurate impressions appears compromised.

Further, PP was not certain that the events were not dreams. RP 635. She testified that for a long time, she thought she had dreamed this. RP 635. However, she testified that on day she testified she believed he did it "for real." RP 635.

In this case, then, the trial court's finding no. 2, that PP had the mental capacity at the time of the incident to receive an accurate impression was a "manifest abuse of discretion" *Swan, supro.*

Likewise, the trial court erred when it entered FOF 3, THAT "PP has sufficient memory to retain an independent recollection of the incident." CP 96-98. Consider that PP lacked the memory to retain an independent recollection of her teachers' names during the years when she attended the daycare. RP 9-10, 31-32. Further, PP did not know whether or not she had been sexually touched by appellant. PP first denied that she had been touched by him. RP 80. At one time when AP questioned PP, PP said she did not know if anything had

happened. RP 80-81. PP's inconsistencies establishes that she lacked sufficient memory to retain an independent recollection of the incident.

(bb) JF was not competent to testify.

JF did not understand her obligation to speak the truth on the witness stand, FOF 1. JF was 9 years old on the day of her testimony and going into the fifth grade. RP 297-98. Although she knew that it is better to tell the truth she testified that if she did not know the answer to a question, it would be better to guess because "... sometimes if you guess, you could get it right." RP 320/ Even after instruction and correction from the deputy prosecutor, JF still maintained that it would be "a little better to try guessing because sometimes if you don't know the answer and you just guess the answer, sometimes it could be the correct answer." RP 320-21. After yet another try, the deputy prosecutor told JF that "it's important that you don't guess about anything you aren't sure about" and told her to "look at the judge and tell her that you promise not to make any guesses." TP 320-21. JF did so. *Id.*

However, on cross-examination JF testified that she had guessed about where the touching happened because she was not sure. RP 322-323.

Moreover, JF's mother testified that she had some problems with JF's truthfulness. P 345. JF lied about bathroom accidents when she was six. RP 346. She still lied and so the mother had changed the punishments from standing in

the corner or going to her room to taking away her tablet or other "fun stuff" that had been planned for the future. RP 347.

Although JF may have understood the concept of being required to tell the truth, she plainly stated that she would guess because she thought she might get the right answer. No witness should do this in court.

Further, the trial court erred when it entered FOF 2, that "JF had sufficient mental capacity to receive an accurate impression of it." As the court noted in A.E.P., the trial court cannot determine whether the child has sufficient mental capacity to receive an accurate impression of the alleged abuse if the child cannot identify a time period when the alleged abuse occurred:

> A.E.P. was unable to fix any particular point in time when the alleged touching occurred. Her confused answer raises questions about her capacity at the time of the alleged event. The alleged touching incident could have happened soon before A.E.P.'s disclosure to Deanne, but it could have occurred two or more years prior to the disclosure as well--there is simply no information in the record which helps narrow the time window of when the event occurred. A.E.P., 132 Wn.2d at 224-25.

JF attended the daycare for more than three years. RP 9. There was no information adduced at the competency hearing regarding when the alleged abuse was supposed to have happened.

JF could not remember facts which were objectively verifiable. She did not know where she went to school in kindergarten, first, or second grade or the names of her teachers. RP 298-300. Of course, she attended the day care during kindergarten, first grade, second grade, and third grade.

Similarly, the trial court erred when it entered FOF 3, that "JF has sufficient memory to retain an independent recollection of the incident." As noted above, JF was unable to remember even where she went to school during the three of the four years she attended the daycare. She later in response to leading questions from nurse practitioner Breland stated that she remembered that the "last incident" occurred in the summer when she was seven. RP 450. This would have been in the summer of 2012, prior to the start of third grade. This would have been right after finishing a school year at a school whose name she could not remember with a teacher whose name she did not know. This is not credible.

JF's trial testimony provides compelling evidence that she was not competent. JF testified that she started daycare at the Pierce's residence when she was in kindergarten or preschool. RP 996. She stopped going there in second grade. RP 1000. JF could not remember whether the daycare children were allowed to go into the upstairs living room and bedrooms. RP 998.
JF testified that sometimes the defendant would give her candy when he "would try bribing me to touch my private part [the place she goes pee or her vagina]." RP 1007, 1008. This happened once or twice or three times. RP 1008, 1013. JF said that one time this happened in a camper in the backyard. RP 1009. She did not remember the time of year. RP 1010. She did not tell anyone. RP 1010. JF also testified that she did not remember the time the defendant gave her candy

and tried to touch her private parts. RP 1011. JF did not remember anything happening upstairs in the living room. RP 1012. JF did not remember ever being in the bedroom with the defendant. RP 1013. JF could not remember ever telling her mother about this. RP 1016. JF could not remember talking to the prosecutor about these allegations. RP 1017. JF did not remember ever telling her aunt DP that defendant tickled her and she was certain that she did not tell her that. RP 1018. She did not remember any interview with the prosecutor's forensic interviewer where she said that defendant tickled/touched her private parts. RP 1021. JF did "not really" remember telling the nurse that defendant had tickled her private parts. RP 1022. JF did not remember DP or her mother asking her questions about the defendant. RP 1040. JF did not know what grade she was in when this happened. RP 1041, She did not know how old she was. RP 1041. She could not remember any time where the defendant used candy to bribe her to touch her private parts, even though she had testified this happened one or two times. RP 1041. JF could not remember defendant giving her any bad touches in his bedroom or living room. RP 1041. She "thought" she could remember one time in the camper. RP 1041-1042, 1044.

JF had testified that she "pretty sure" she told the prosecutor's interview the truth but she was not sure because it was so long ago. RP 1042.

JF was not competent to testify.

Because the trial court admitted the testimony of PP and JF where not all of the *Allen* factors were satisfied, this court must reverse Pierce's convictions.

2. THE COURT ERRED WHEN IT ADMITTED UNRELAIBLE CHILD HEARSAY BEYOND THE SCOPE OF WHAT IS ADMISSIBLE UNDER 9A.44.120.

The prosecution of Pierce rests almost entirely on statements made by PP and JF, who were not competent to testify at trial. The girls made inconsistent statements about whether or not they had even been touched, how many times they might have been touched if they were touched, where they were touched.

The State relied on hearsay admitted pursuant to *RCW 9A.44.120*[1] to elicit most of its case. The trial court misapplied the factors from *State v. Ryan*, 103 Wn.2d 165, 691 P.2dx 197 (1984) and improperly admitted child hearsay.

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[1] A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if:

- (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
- (2) The child either:
  - (a) Testifies at the proceedings; or
  - (b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

The child hearsay statute provides that out-of-court statements by a child under the age of ten who testifies at the trial may be admitted if the child finds sufficient indicia of reliability. RCW 9A.44.120(1), (2)(a); *Ryan*, 103 Wn.2d at 172; *A.E.P.*, 135 Wn.2d at 226-27. Child hearsay must manifest "particularized guarantees of trustworthiness." *Ryan*, 103 Wn.2d at 173. The statements must be characterized by such a degree of inherent trustworthiness as will serve as a substitute for cross-examination. *Id*, at 175. In assessing trustworthiness, the Supreme Court has set forth nine separate factors for determining admissibility under RCW 9A.44.120, known as the *Ryan* factors:

(1) whether there is apparent motive to lie;
(2) the general character of the declarant;
(3) (3) whether more than one person heard the statements;
(4) whether the statements were made spontaneously;
(5) the timing of the declaration and the relationship between the declarant and the witness;
(6) whether the statement contained assertions about past fact;
(7) whether cross-examination could establish that the declarant was not in a position of personal knowledge to make the statement;
(8) how likely it is that the statement was founded on faulty recollection;
(9) whether the circumstances surrounding the making of the statement are such that there is no reason to support that the declarant misrepresented the defendant's involvement.

Ryan, 103 Wn.2d at 175-76. Although each factor need not favor admission of child hearsay, the factors as a whole must be substantially satisfied. *State v. Swan*, 114 Wn.2d 613, 652, 790 P.2d 610 (1990)[2].

[2] At least three of the factors have been deemed irrelevant or duplicative. For example, the seventh factor, the possibility that cross-examination would show lack of knowledge, is

Moreover, analysis of the Ryan factors focuses on the statements themselves. Adequate indicia of reliability must be found in circumstances surrounding the making of the out-of-court statement, not from the subsequent corroboration of the criminal act. *State v. Stevens*, 58 Wn.App. 478, 486, 794 P.2d 38 (1990), quoting Ryan 103 Wn.2d at 174.

A court's decision to admit child hearsay statements must be reversed when the court abuses its discretion in weighing the *Ryan* factors. *Pham*, 75 Wn.App. at 631. A court abuses its discretion when its decision is manifestly unreasonable, or when discretion is exercised on untenable grounds, or for untenable reasons, such as misapplication of the legal standard. *State v. Dixon*, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006), quoting *State v. Rohrich,* 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

In the instant case, the court erred in its assessment of several key *Ryan* factors.

Regarding PP's child hearsay statements, the trial court ordered that her statements to her parents, Angela Prendiville and Patrick Prendiville, Debbie Profitt and Keri Arnold would be admissible at trial. CP 99-102.

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irrelevant if the child testifies. *State v. Keneally*, 151 Wn.App. 861, 880, 214 P.3d 200 (2009); *State v. Woods*, 154 Wn.2d 613, 624, 114 P..3d 1174 (2005). Factor nine (no reason to suppose the declarant misrepresented the defendant's involvement) is redundant of the first five factors. *In re Dependency of S.S.*, 61 Wn.App. 488,, 499, 814 P.2d204 (1991). Factor six, whether the statement is an assertion of past facts, has been found unhelpful and can be ignored "so long as other factors indicating reliability are considered." *State v. Young*, 62 Wn.App. 895, 902, 802 P.2d 829 (1991).

The trial court abused its discretion when it held that under Ryan factor no. 1, PP had no apparent motive to lie. First, she had a motive to lie simply to please her mother. Her mother badgered her to say that Pierce had touched her private parts [vagina]. RP 58, 80-81. 260, 264-65, 268. Patrick Prendiville also asked his daughter with questions about the alleged touching. RP 277-78. Both parents had been angry with Pierce because he had asked PP questions about how long her father spent with Liz Pierce when he dropped off the children in the morning. RP 659, 661. Patrick Pierce liked to flirt with Liz Pierce and she was uncomfortable with it. RP 1457. PP did not like when defendant asked her how much time her dad had spent with Liz Pierce and she knew her parents did not like his questions. RP 659, 661.

Further, the "motive to lie" factor also encompasses the diminished reliability that occurs when a child has made different and/or inconsistent statements. *Ryan*, 103 Wn.2d at 176. That is the case here. PP initially shook her head and also said "no" when her mother asked her if anything had happened. RP 663, 664-65. When she was asked her inconsistent statements at trial, she said, "I want my mother." RP 668.

PP testified at trial that she at first told the prosecutor's interviewer that she "didn't know" if the defendant had touched her. RP 671. When they discussed the touching a second time, PP again told the interviewer she didn't know if he touched her private part or not. RP 671. When they discussed this a

third time, she repeated that she did not know if the defendant had touched her private part or not. RP 671.

PP's mother testified at trial that while on the camping trip where the alleged initial disclosure occurred, "I questioned [PP] so much for those three or four days, I don't recall exactly what all she said, but at one point, she did say, I don't know." RP 770. The mother agreed that PP had also told her than no touching had occurred. RP 705, 741. The mother testified that after she "encouraged" PP more than once to tell her if defendant had touched her, PP said he had touched her "pee-pee." RP 706;

PP's mother called CPS a lot, was told to quit questioning her daughter, but did not. RP 725, 731. At one point, PP said she did not know if anything had happened. RP 733. When AP reported that call to CPS, she said, "She doesn't know. Maybe, she changed her story." RP 734. During another call, AP reported to CPS that PP had initially denied that any touching had occurred. RP 730-31.

The record also does not support the trial court's finding , no. 4,that PP's statements were "spontaneous as defined by the case law." CP 99-102.

A statement is spontaneous for *Ryan* analysis purposes as long as the questioning that elicited the statement was not leading or suggestive. *Keneally*, 151 Wn.App. at 883. Unfortunately, by asking again and again what happened, AP clearly conveyed to PP that her answers were wrong. AP's questioning was relentless and only stopped when PP stated that she had been touched.

AP acknowledged that she questioned her daughter "so much" over that three and four day period while they were camping. RP 770. It is one thing to ask a question or two. But to barrage an 8 year old child with questions about her intimate parts over and over does not elicit "spontaneous" answers.

The timing and relationship, no. 5, factor does not provide indicia of trustworthiness in this case. PP is the daughter of AP and PP, both of whom heard initial disclosure that weekend. Both parents were upset with defendant because they believed he had asked their daughter inappropriate questions. AP also appeared unusually suspicious because she freaked out when PP stated that defendant had carried PP upstairs on his shoulders. RP 56. The daycare was in the basement and the children were allowed upstairs in the kitchen to eat. RP 136. There is nothing sinister or perverted about PP's statement. AP's reaction was simply bizarre. DP, present when AP questioned PP, was also angry with defendant and had broken off contact with him. RP 260, 381-85, 284, 286. Against the wishes of JF's mother, she questioned JF about whether defendant had ever sexually touched her and claimed to have received disclosure in the same words that PP had used, that is, that defendant had tickled her on her leg, like a spider and touched her vagina. RP 284.

The record does not support the trial court's finding [no. 6] that "the possibility of PP's recollection is faulty." PP has no consistent recollection of anything defendant did. PP thought it was a dream, that it happened more than

once then thought it happened once, could not say when, lacked any detail. She could not corroborate objective facts that occurred concurrently with the alleged abuse so far as can be guessed.

PP's testimony at trial was vague and reluctant. RP 635. Her early statements that she thought she had dreamed the events damaged her credibility. RP 635. She could not determine when the events occurred. RP 635 She further did not meet the criteria for competency. Improper admission of child hearsay statements of PP requires dismissal. Likewise, the trial court abused its discretion when it admitted child hearsay from JF.

The record does not support the trial court's finding 1, that "JF had no apparent motive to lie." JF's mother had prohibited DP from questioning JF about any alleged abuse by defendant. RP 362. Nevertheless, DP elected to question JF anyway. RP 280-281. She did so when she had JF and JF's younger sister in the car with her. RP 279. She asked JF if defendant ever made her uncomfortable and, amazingly, claimed to have received disclosure almost in the same words that were uttered by PP several days prior, to-wit: that defendant had tickled her leg like a spider and touched her vagina. RP 280-282. Interestingly, JR [JF's mother] had never used the word "vagina" with her daughter and, instead, had called it the "bad spot." RP 372. It seems unlikely that the reported disclosure ever occurred.

Regarding the trial court's finding no. 3., that JF's statements were generally consistent ....

3. THE TRIAL COURT DENIED DEFENDANT HIS CONSTITUTIONAL RIGHT TO TRIAL BY JURY BY FAILING TO TIMELY TAKE ACTION WHEN REPEATEDLY ADVISED ABOUT SLEEPING JUROR NO. 8.

A criminal defendant's right to trial by jury is guaranteed by the United State Constitution amend. VI and Wash. Const. art. I, § 22.

RCW 2.36.110 requires the trial court to excuse from further jury service any juror, who in the opinion of the judge has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention, or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service. Further, *CrR 6.5* states that: "[i]f at any time before submission of the case to the jury a juror is found unable to perform the duties the court ***shall*** order the juror discharged." (Emphasis added.) Thus, both *RCW 2.36.110* and *CrR 6.5* place a continuous obligation on the trial court to excuse any juror who is unfit and unable to perform the duties of a juror.

In this case, there is no doubt that the trial court was aware that Juror No. 8 was manifesting unfitness to sit as a juror. During trial, the judicial assistant informed the court that Juror Number 1 believed Juror Number 8 was sleeping during testimony. RP 1178. The court further stated that some of the court staff had noted that Juror Number 8 had been leaning her head back and

closing her eyes. RP 1178. The deputy prosecutor also informed the that the testifying witness, Keri Arnold, had noted that lady at the end [the juror] appeared to fighting sleep. RP 1178.

Juror No. 1 spontaneously interrupted the State's closing argument to report that there was a juror falling asleep. RP 1661. The court asked if there was a need for a break. RP 1661. Juror No. 8 replied that he/she was listening. RP 1661.

Following closing arguments, the court excused jurors 13, 14, and 15. RP 1686. Only after the alternates had been excused did the State ask to have Juror No. 8 questioned about her sleeping problem. RP 1703-1704. Defense counsel asked to dismiss her for cause and objected to counsel questioning a deliberating a juror. RP 1704.

The State's recollection was the juror had been reported to be sleeping during the forensic interviewer's testimony, the playing of one of the children's interviews, and also during the State's closing argument. RP 1795.
Defense counsel wanted the court to ask her "whether given her apparent sleeping, she has not heard any of the evidence or missed any of the testimony." RP 1705.

During the court's subsequent questioning, Juror No. 8 stated, "*It wasn't a full sleep*. It was a brief closing of my eyes, slightly longer than blinking, yes." RP 1706. The juror explained, "Not full sleeping. I'm still listening." RP 1707. The

juror also offered, "Sometimes when my eyes are open, I'm looking at everybody else and seeing what they're doing, and it distracts me from, like, whatever they're actually saying." RP 1707. The juror explained that closing her eyes could keep her thoughts from wandering. RP 1707.

The court then asked Juror No. 8: "Well, because of that or because of actually dozing off, do you believe that you have fully and fairly heard all the evidence in the case in a way that enables you to perform your duties as a juror?" RP 1707. The juror answered, "Yes, I do." RP 1707.

Based on this record, the trial court failed in its duty to guarantee Pierce his constitutional right to jury trial. The trial court's duty requires on-going vigilance and protection of this fundamental right. A "wait and see" attitude is insufficient.

The trial court should have and failed to stop the proceedings during the testimony of Arnold to ascertain whether Juror No. 8 was fit to continue. The parties knew that she worked odd hours and may have been very tired. RP 1078.

She continued to be tired. Juror No. 1 notified the court again during closing arguments that the juror was sleeping. RP 1661. The court did not stop to inquire at that point whether the juror had been able to be attentive throughout the proceedings.

Only after the court had excused the alternates did the court perform its required duty under *RCW 2.36.110* and *CrR 6.5*. That is, the trial court

questioned Juror No. 8 about her sleeping during the trial. The juror candidly replied that she had not been in a "*full sleep*". RP 1707. The court did not exclude the possibility that the juror may have "dozed off" but proceeded to ask the juror whether she believed she had heard all of the evidence so that she could fully and fairly decide the case. RP 1707.

With all due respect to the trial court, Pierce submits that a sleeping or dozing juror would hardly know whether she had heard all of the evidence. The juror could not and would not know what she had missed. The question could not elicit any meaningful answer.

If the trial court had wanted to make a meaningful record, the trial court should have questioned the juror who reported the sleeping to the court. It is certain that Juror No. 1, who twice report that Juror No. 8 was sleeping, did not make these reports without case. Further, the court should have made a detailed record of the observations of court staff, noting dates, times, detailed observations of what was noted about the sleeping juror. The deputy prosecutor made a record regarding the observations of the testifying witness.

The trial court's action was "too little, too late." By the time the trial court acted, the trial court realistically could not excuse Juror No. 8. because the alternate jurors had been excused. There could no longer be a jury of twelve.

The trial court failed to act to guarantee Pierce's constitutional right to a trial by a jury of twelve fit citizens.

As to remedy, Pierce argues that he is entitled to dismissal. The defendant's constitutional right to be tried by the jury first chosen and sworn to try his case is inviolable. *State v. Rich*, 63 Wn.App. 743, 749, 821 P.2d 1269 (1992). Had the trial court properly fulfilled its duties, the case could have and would have proceeded to deliberations with fully competent panel. Dismissal with prejudice is the sole appropriate remedy in this case.

4. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT DEFENDANT COMMITTED THE CRIMES OF FIRST DEGREE CHILD MOLESTATION AGAINST PP AND FIRST DEGREE CHILD MOLESTATION AGAINST JF.

Under the due process clauses of the federal and state constitutions, the State must prove every element of a crime beyond a reasonable doubt. *U.S. Const. amend. XIV; Wash. Const. art. I, § 3; Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).* The double jeopardy clause entitles a defendant to a dismissal with prejudice where the evidence, including any erroneously admitted evidence, is insufficient as a matter of law. State v. Stanton, 68 Wash. App. 855, 867, 845 P.2d 1365 (1993).

In this case, the State failed to prove that Pierce committed the crime of first degree child molestation against PP and one count of first degree child molestation against JF. The jury acquitted Pierce of two counts of first degree child molestation against JF and thus it is unknown what acts they relied upon to convict him for the one count of conviction.

The State's failure of proof for PP is more than a credibility determination. It is a question of the lack of evidence. There is no physical evidence to sustain the charges of first degree child molestation. There is no time frame within the two year period when the act supposedly occurred, despite PP being there during changes of seasons, holidays, birthdays, etc. There is a complete inability to consistently correlate the abuse with her being in any grade and with any teacher as, interestingly, she cannot recall the names of her teachers during these critical time frames. RP 629, 633. She did not know whether her allegations resulted from a dream or from reality. RP 635. Angela Prendiville relentlessly questioned her about being sexually touched after being told that Pierce had carried her "upstairs on his shoulders". After receiving that information, and knowing that daycare children, went upstairs from lower floor daycare to eat in the kitchen, use the bathroom, etc., Angela Prendiville leaped to the conclusion that PP had been sexually touched. By her own admission, she questioned PP so much for 3-4 days that she had a hard time remembering everything PP said. RP 768, 770. But she knew that PP said that nothing happened, that she might have been dreaming, that she was tickled and did not like it, that she was touched on her private, and that she was not touched on her private. RP 678, 705, 733, 741, 877-878. Her mother appeared to want PP to report that she had been sexually touched by Pierce.

PP told the child interviewer that she "didn't know if she had been touched." RP 671. She also stated that she did not know if she had been touched in her private parts. RP 671

Both the Prendivilles and Profitt had animus toward Pierce. RP __.

Profitt had been allowed to babysit JF but had forbidden to question JF about any touching by Pierce by JF's mother JR. RP 279. Profitt ignored JR's instructions. RP 280. Unsurprisingly, Profitt claimed to have "disclosure" from JF in essentially the same words used by PP in one of her "disclosures", that is, JF reportedly said that Pierce made the "spider leg touches up her leg and touched her on her vagina." RP 280-282. Of course, JF had never used the word "vagina." RP 372. Her mother had taught her to use the word "bad spot" for her vagina. RP 372. It is wholly unlikely that JF ever would have uttered "vagina."

But Profitt got the ball rolling.

JR was so fearful that JF would not be able to remember why she was going to court that before JF testified at trial, she refreshed her recollection by talking to her about what had happened. RP 762. Even then, JF could not remember much, at most only vague details about a single possible incident. RP 635.

At trial , JF testified that Pierce tried to bribe her with candy two or three times inorder to touch her private parts RP 1007, 1008. Sshe said this happened one time in the camper but she did not know what season it was. RP 1010. She

did not remember talking to her mother about this. RP 1016. She did not remember talking to the prosecutor or the prosecutor's interviewer. RP 1017, 1021. She was certain she did not tell Debbie Profitt that Pierce had touched her private parts. RP 1021. JF was clear that she did not know how old she was when the alleged touching occurred or what grade she was in. RP 1046.

The State may have proven by a preponderance or some lesser burden that this group of people had ill-feelings toward Pierce and that these ill-feelings caused confusion and conflict in children. But the State failed to prove beyond a reasonable doubt that Pierce committed the crimes of child molestation in the first degree.

D. CONCLUSION

For the foregoing reasons, Mr. Pierce respectfully asks this court to dismiss this case with prejudice.

DATED this 16th day of August, 2017

/s/ Barbara Corey
Barbara Corey, WSB #11778

I declare under penalty of perjury under the laws of the State of Washington that the following is a true and correct: That on this date, I delivered via the filing portal a copy of this Document to: Appellate Division Pierce County Prosecutor's Office, 930 Tacoma Ave So, Room 946 Tacoma, Washington 98402 and via USPS to Jimmy Woodbee Pierce.

8/16/17	**/s/ William Dummitt**
Date	**Signature**

BARBARA COREY, ATTORNEY AT LAW

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